RE: SEOW YIN FONG; *EX PARTE:* UNITED ORIENT LEASING COMPANY BERHAD & ANOTHER CASE

HIGH COURT, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[BANKRUPTCY PROCEEDINGS NOS. B. 370 OF 1986 & B. 372 OF 1986]
20 MAY 1994

BANKRUPTCY: Application for recission and annulment of receiving and adjudication orders - Application made pursuant to s. 105(1) Bankruptcy Act 1967 - Adjudication and receiving orders made on 11 May 1987 - Application for recission and annulment made after a lapse of six years - Whether application should be allowed - Whether judgment creditors and proved creditors would be seriously prejudiced if the application were to be allowed - Whether prejudice caused was irrelevant - No reasonable explanation given for delay in making application - Whether a material consideration.

The applications in Bankruptcy Proceedings Nos. B/370/86 and B/372/86, applying for the recission and annulment of the receiving and adjudication orders respectively, were heard together as they are identical and involve the same issue. The applications were made pursuant to s. 105(1) of the Bankruptcy Act 1967 (the Act) on the ground that the said orders ought not to have been made.

The applicants contended, in support of their application, that the amount stated in the respective bankruptcy notices were not quantified up to the date of the bankruptcy notices and further that the bankruptcy notices also included a sum which was not due and owing as at the date of the notices, namely interest until date of full and final settlement. In the circumstances, the applicants contended that the bankruptcy notices were invalid and therefore the whole bankruptcy proceedings were a nullity and both the receiving and adjudication orders ought not to have been made.

The judgment creditor and the other creditors who had proved their debts opposed the applications on the grounds that the applicants had admitted in full the proof of debts filed against them at the first creditors' meeting and had further affirmed their liabilities to the respective creditors at the Public Examination. It was also avered that the applicants were guilty of prolonged, inordinate and inexcusable delay in making the applications and that the petitioning creditor and the other creditors who had filed their proof of debts would be highly prejudiced by the applications.

Held:

[1] The application to annul and rescind the receiving and adjudication orders were made more than six years after the grant of the said orders. If the orders were rescinded and annuled on the grounds that the whole bankruptcy was a nullity, the creditors who had filed their proof of debts would be greatly prejudiced. *Prima facie*, their actions against the applicants over the alleged debts owing to them would be statute barred even though the delay in filing the actions were through no fault of theirs as the applicants were bankrupts at the material time.

[2] The power of the Court, under s. 105 of the Act, to annul the adjudication is a discretionary one which must be exercised in accordance with proper principles. The interests of the parties affected has to be taken into consideration in exercising the discretion. In addition the applicants had not given any explanation for the delay in bringing these applications to Court.

[3] Even if there is merit in law for annuling the adjudication orders made on both the applicants on the grounds that the bankruptcy notices are void *ab initio*, serious prejudice would be caused to the creditors if the applications are granted. Further, to allow the applications would open the flood gates for other applicants to do the same to the serious prejudice of innocent parties.

[4] In the circumstances of the case, justice would not be served by going into the merits of the applications.

[Applications to annul and rescind receiving and adjudication orders dismissed with costs].

Cases referred to:

Low Mun v. Chung Khiaw Bank [1988] 1 MLJ 263 ***(refd)***

Ghazali Bin Mat Noor v. Southern Bank Berhad & 4 other appeals [1989] 2 MLJ 142 ***(refd)***

Chong Chin Shoong v. Development & Commercial Bank Ltd. [1990] 1 MLJ 285 ***(dist)***

Fawzia bt Osman v. Bank Bumiputra Malaysia Berhad [1991] 1 CLJ 652 ***(dist)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 105(1), 131

Bankruptcy Rules 1969, Rules 95, 117, 274

For the Official Assignee - Ko Fui Loong
For the judgment debtors - Y.Y. Sim; M/s Tang & Partners
For the judgment creditor - Lau Mei Ling; M/s Sim & Yee

JUDGMENT

Haji Abdul Kadir Bin Sulaiman J:
Both applications in bankruptcy proceedings Nos. B/370/86 and B/372/86 applying for the rescission and annulment of the receiving and adjudication orders respectively, were heard together as they are identical and involve the same issue. The two orders on the respective applicants were made on 11 May 1987 on the petition of United Orient Leasing Co. Bhd., Kuching, (hereinafter referred to as "the judgment creditor"), based on the respective bankruptcy notices issued on 17 September 1986 on each of the applicants. On 4 March 1994 I dismissed both the applications with costs to be taxed unless agreed. I now give my reasons.

The applications were made pursuant to s. 105(1) of the Bankruptcy Act 1967 (hereinafter referred to as "the Act") on the ground that the said orders ought not to have been made. In both the cases, there was no application made by the debtors to set aside the bankruptcy notices issued as provided for under rule 95 of the Bankruptcy Rules 1969 (hereinafter referred to as "the Rules"). Similarly, in both the cases, there was no notice under rule 117 of the Rules filed by the applicants intending to show cause against the respective petition of the judgment creditor.

However, after a lapse of over six years, the applicant in B370/86 filed her application on 11 October 1993 to have the said orders rescinded and annulled. The applicant in B372/86 filed his similar application on 4 October 1993. In the meantime, 17 creditors in B/370/86 and 37 creditors in B372/86 had tendered their proof of debts with the Official Assignee. According to the Official Assignee's Report, the applicant in B370/86 was ordered to pay RM20 p.m. for the general benefit of her creditors w.e.f. 1 January 1993 and the applicant in B/372/86 was ordered to pay RM100 p.m. w.e.f. 1 December 1991.

In their respective affidavit in support of the application to have the orders rescinded and annulled, each applicant avers that the amount stated in the bankruptcy notice was not quantified up to the date of the bankruptcy notice and further the bankruptcy notice also included a sum which was not due and owing as at the date of the notice i.e. interest until date of full and final settlement. The notice claimed for the capital sum with interest thereon at the agreed rate of 0.065 per cent per day from 1 August 1985 till full and final settlement and costs of RM3,500. In the circumstances, they contend that the bankruptcy notices were invalid and therefore, the whole bankruptcy proceeding was a nullity and hence both the receiving orders and the adjudication orders ought not to have been made. Both the applications met with opposition from the creditors who had since proved their debts in bankruptcy including the judgment creditor.

In opposing the applications, the judgment creditor filed identical affidavits affirmed on 13 December 1993 by Leong Poh Wah, its regional manager. He avers that it was an accepted practice at the issuance of the bankruptcy notice in 1986 that the amount stated in the notice need not be quantified up to the date of the notice and therefore, the bankruptcy notice was not invalid at the time it was issued. He further avers that the applicants have waived their right, if any, for there was no appearance by the applicants on 11 May 1987 when the orders were made against them. At the First Creditors' Meeting held in the presence of the respective applicant, they admitted in full the proof of debts filed against them except in respect of one creditor. At the Public Examination they further affirmed their respective liabilities to the creditors. In the circumstances, they had admitted all claims made against them. The deponent also avers that each of them is guilty of prolonged, inordinate and inexcusable delay in taking up the respective application and that the petitioning creditor and other creditors who have filed their proof of debts will he highly prejudiced by the application. There is also filed an affidavit affirmed by Ramli bin Haji Taib on 17 January 1994, the Branch Manager of Bank Bumiputra Malaysia Berhad, Kuching, one of the creditors, in respect of each application, adopting the facts deposed to in the affidavits of Leong Poh Wah, mentioned earlier.

In respect of B372/86 in addition to the affidavits mentioned above, there are three other affidavits filed in opposing the application. One is by Chan Siew Yan, advocate for MIDF Berhad, one of the creditors who had lodged their claim against the estate of the applicant

pursuant to the making of the receiving and adjudication orders by the Court. She deposed that on 25 March 1987 a judgment was entered against the applicant in favour of MIDF in Civil Suit No KG. 626/1986. Bankruptcy proceeding was duly commenced against the applicant in Bankruptcy No 325/1987. However, because of the orders made upon the applicant in B372/86, the said proceeding was discontinued and instead, proof of debts was filed against the debtor's estate. The claim in the sum of RM144,602.78 was duly admitted and registered against the debtor's estate. During the creditors' meetings and public examinations, there was no indication that the applicant would be seeking to set aside the order made against him. In the circumstances he has waived his rights to have the order set aside. She further avers that but for the orders made, MIDF would have pursued with the bankruptcy proceedings to recover the judgment debt. In the circumstances being more than 6 years now, MIDF would be unfairly prejudiced. The second affidavit is by Yoong Yew Loen, the Branch Manager of Credit Corporation (Malaysia) Berhad, one of the creditors, affirmed on 28 February 1994. The company had an action against Wangi Mix (M) Sdn. Bhd. As all the guarantors including the applicant were declared bankrupt, the company proceeded to file proof of debts in respect of their claims against the estate of the applicant. As the claims were duly proved and accepted, the company did not proceed with their action against the applicant as a guarantor of Wangi Mix (M) Sdn. Bhd. Hence if the application is allowed, they would be greatly prejudiced. The last affidavit was affirmed on 28 February 1994 by Fung Yee Kwok, the Senior Manager of Interfinance Berhad, yet another creditor who had proved their debts against the estate of the applicant. He deposed that upon obtaining judgment against the applicant in Suit No KG.45/85, the company commenced bankruptcy proceeding against the applicant in Bankruptcy No. 503/1986. However, the proceeding did not proceed because the applicant had been made a bankrupt. The company proceeded to lodge proof of debts against his estate, which was duly accepted. It was duly admitted by the applicant with no objection. In the circumstances, if the application of the applicant is allowed it would be highly prejudicial to the company as the judgment entered in favour of the company was more than 6 years old.

It is against this background that the two present applications were placed before me. The basis for the making of the applications by both applicants was the decisions of the Supreme Court in *Low Mun v. Chung Khiaw Bank* [1988] 1 MLJ 263 and *Ghazali Bin Mat Noor v. Southern Bank Berhad & 4 Other Appeals* [1989] 2 MLJ 142. It is not in dispute that in respect of both the bankruptcy notices in both these bankruptcy proceedings, the amount of interest had not been quantified as at the date of the issue of the respective notice. Applying the principles in the two Supreme Court cases mentioned above, the respective bankruptcy notice was a nullity *ab initio* and the failure on the part of the applicants to comply with the notices is not an act of bankruptcy, and bankruptcy petitions founded on them must necessarily fail. In further support of these applications, the learned Counsel for the applicants cited the case of *Chong Chin Shoong v. Development & Commercial Bank Ltd.* [1990] 1 MLJ 285. In that case the applicant debtor was made a bankrupt pursuant to the receiving and adjudication orders made upon him on 28 February 1989. The notice of motion for the rescission and annulment of the orders were filed on 21 July 1989, after a lapse of about 5 months. Though in that case there were already creditors who filed in their proof of debts arising out of the orders made, Abdul Malek J. allowed the application of the applicant to have the receiving and adjudication orders made against him rescinded and annulled. His Lordship at p. 286 has this to say:

> This, in my view, is totally irrelevant as the whole bankruptcy proceedings are a nullity. In any case, there is nothing to stop the judgment creditor filing a proper bankruptcy notice on the second debt if it was a judgment debt which it was not at the date of these arguments.

In my view, that case can be easily distinguished from the two applications before me now. In that case, the adjudication order and receiving order were made against the applicant after a lapse of 5 months or so only. In the meanwhile proof of debts in bankruptcy were filed with the official assignee. In the circumstances, I would say that by granting the application of the applicant to rescind and annul the orders, the creditors there are not thereby seriously prejudiced, for by the granting of the application, those creditors are still free to institute bankruptcy proceedings or any other actions against the applicant as they are clearly within the limitation

period to do so. Whereas in the present two applications before me now, the receiving and adjudication orders were made against them over 6 years before the applications to rescind and annul were made. In the meanwhile proof of debts in bankruptcy were filed by various creditors pursuant to the orders made by the Court. If the orders were rescinded and annulled on the ground that the whole bankruptcy proceedings are a nullity, then as different from the case cited, those creditors will be greatly prejudiced. *Prima facie*, their actions against the applicants over the alleged debts owing to them by the applicants will be statute barred. Their delay in filing the actions against the applicants was through no fault of theirs. They could not do it earlier for the fact that the applicants were bankrupts.

The learned Counsel for both the applicants next cited the case of *Fawzia bt Osman v. Bank Bumiputra Malaysia Berhad* [1991] 1 CLJ 652, another Supreme Court decision, in support. In that case the High Court dismissed the application of two bankrupts to have the receiving and adjudication orders made against them set aside on the ground that the bankruptcy notices were null and void *ab initio* for non-compliance with the provisions of s. 3(1)(i) of the Act in not quantifying the amount of interests required to be paid for the purpose of the bankruptcy notices. Dissatisfied with the decision, they both appealed to the Supreme Court. The Supreme Court allowed their appeals, holding that the defect was not a formal one or a mere irregularity that could be cured by s. 131 of the Act or by Rule 274 of the Bankruptcy Rules. Both the notices were void *ab initio* and non-compliance with them would not constitute an act of bankruptcy under s. 3(1)(i) of the Act. It is not disclosed in the report of the case as to whether in that case there were creditors who had filed the proof of their debts in bankruptcy or, if any, whether this point was ever argued. In any event it would not have seriously prejudiced the creditors as the life of the receiving and adjudication orders was about six months only. They were made in May 1989 and the application to set aside was made in December 1989. If the adjudication order is annulled, those creditors affected by the adjudication order are free to institute whatever actions against the bankrupts after the annulment as they would still be within the statutory period.

It is true that once a thing is a nullity it is null and void. But being the orders of the Court, unless proper steps are taken to have the orders set aside, they remain as orders of the Court. The power of the Court to annul the adjudication under s. 105 of the Act is a discretionary one. Being a judicial discretion its exercise by the Court must be in accordance with proper principles. The interest of the parties affected has to be taken into consideration in exercising the discretion. These applications of the applicants were filed after six years has run from the date of the orders made and at least four years after the Supreme Court decisions in *Low Mun* and *Ghazali's* cases, *supra*. No explanation at all was given by either of the applicant for this delay in bringing these applications to Court. In his submission, the learned Counsel for both applicants attempted to explain the delay by saying that the matter would not have been brought before the Court, had it not been for the two Supreme Court decisions. Be that as it may, but why does it take them four years to decide on the making of the applications? In his submission, the learned Counsel for the applicants admitted that some creditors who have proved their debts are highly prejudiced if the applications are granted but he contends that it is irrelevant to consider when the Court is satisfied that the bankruptcy notice is void *ab initio*. Thus it is put to the Court that as the orders are a nullity, the issue of delay is irrelevant to consider. But on the other hand, what about the prejudice done to the innocent creditors in these cases? Are they to be penalised through no fault of theirs? For that reason, it is my view that, even if there is merit in law for annulling the adjudication orders made on both the applicants on grounds that the bankruptcy notices are void *ab initio*, serious prejudice would have been caused to the creditors if the applications are granted in the circumstances and if the decision to grant is followed, then it would open the flood gates for other applicants to do the same to the serious prejudice of innocent parties. In the circumstances of the case here, I am of the view that justice will not be served by going into the merits of the applications. So, the applications of both the applicants are hereby dismissed with costs to be taxed unless agreed.